tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only."

Again, in the case of *Cobb* v. *Lane*,[7] a sister bought a house and allowed her brother to live there with his family without paying any rent, and the sister paid the rates. After the sister passed away, her personal representative claimed possession of the house and it was held that no tenancy had been created as there was no intention to create any legal relationship.

Applying the principles to the facts of the present case, there can hardly be any doubt that the 2nd respondent was at all material times a subtenant of the said premises. He was let into possession of the said premises, paying the rent therefor to the late Tay Ping Kee and, after his death, to the appellants. Apart from the forms of the "licence" agreements made, there was no circumstance which negatived the intention to create the relationship of landlord and tenant. The "licence" agreements were ineffectual to turn a tenancy into a licence. The circumstances and the conduct of the parties show that what was intended was that the 2nd respondent should be granted, and he was granted, exclusive possession of the said premises at a rent and for a term to carry on his business. The occupation by the 2nd respondent had all the features of a tenancy, and a tenancy it was that was created. Accordingly, the appeal failed.

Appeal dismissed.

Solicitors: *V.K.S. Narayanan; Chu Chan Gan & Ooi; Chan Kam Foo & Associates.*

THE "BENOI VI" SINDO TIMBER ENTERPRISES (PTE.) LTD. v. THE "BENOI VI", OWNERS & ORS.

[C.A. (Wee Chong Jin C.J., Thean & Chua JJ.) November 18, 1986]

[Singapore – Civil Appeal No. 55 of 1985]

Shipping Law – "Perils of the sea" – Meaning of.

Under a fixture note made between the appellants and the second respondents, there was shipped on "Benoi VI", a dumb barge, belonging to the first respondents, 994 pieces of Indonesian ramin round logs for carriage from Indonesia to Singapore. "Benoi VI" was towed by the tug boat "Donna." When the vessels arrived in Singapore almost all the logs were missing. The insurers were informed. An investigation was carried out by a firm of marine surveyors and consultants which concluded that "the loss of the cargo is attributable to the heavy weather prevailing during the period the vessel was proceeding to Singapore."

Acting on the report of the surveyors, the insurers made payment for the loss of the logs in the sum of $103,304.65. The insurers then commenced this subrogated action. The appellants' claim for damages for the loss of the logs was dismissed by the High Court with costs. They appealed to the Court of Appeal. The main issue was whether the loss of the logs was caused by perils of the sea in the course of the voyage.

Held, dismissing the appeal: (1) in general the term "perils of the sea" refers only to fortuitous accidents or casualties of the seas and does not include the ordinary action of the winds and waves. Whether in any particular case there is a peril or not is a question of fact;

(2) in the present case the loss was occasioned by the perils of the sea.

Cases referred to:

(1) *Thomas Wilson, Sons & Co.* v. *Owners of Cargo per the Xantho* (1887) 12 App. Cas. 503, 509.

(2) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887) 12 App. Cas. 484, 502.

(3) *Grant, Smith and Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.* [1920] A.C. 162, 171.

HIGH COURT.

Loh Boon Huat (*Shirley Dhillon* (*Miss*) with him) for the plaintiffs.

Cheong Yuen Hee (*Roy Chua* with him) for the second defendants.

Cur. Adv. Vult.

Sinnathuray J.: This action was heard on July 1, 1985 pursuant to the decision of the Court of Appeal given on January 14, 1980, that the case be remitted to the trial Judge to call upon the defence as I had earlier, on September 20, 1979, at the conclusion of the hearing of the plaintiffs' case, dismissed the plaintiffs' claim with costs.

Before I consider the defence, I should mention that there is another decision of the Court of Appeal pertaining to this case. On October 26, 1982 the Court ordered that the evidence of one Shahidan bin Ahmad be taken *de bene esse* before me. As it was not done earlier, at the continued

hearing, I heard his evidence as part of the plaintiffs' case before I called upon the Defence.

It is useful now to recapitulate the facts and the issues for determination in this case. Under a fixture note made between the plaintiffs and the second defendants, there was shipped on "Benoi VI," a dumb barge, belonging to the first defendants 500 hoppus tons of timber ("logs") from Port Pemangkat, Indonesia. "Benoi VI" was towed by the tugboat "Donna." When the vessels arrived in Singapore almost all of the logs were missing. The insurers were informed. An investigation was carried out by Singapore Adjusters and Surveyors Co. (Pte.) Ltd, a firm of marine surveyors and consultants. The surveyors said that "the vessels encountered heavy weather shortly after departing Pemangkat and that the vessels altered course at 1830 hours for the sheltered passage of Berhala Strait." They concluded that "the loss of the cargo is attributable to the heavy weather prevailing during the period the vessels were proceeding to Singapore." Acting on this report, the insurers paid the plaintiffs for the loss of the logs in the sum of $103.304.65. The insurers then brought this subrogated action. The main issue was whether the loss of the logs was caused by perils of the sea in the course of the voyage.

A material witness for the plaintiffs on this issue was Mr. Foong Sze Fook, an Assistant Director of Meteorological Department. He gave a weather report of the sea area where it was said the vessels had encountered bad weather. He said that observations of the sea area between Singapore and Borneo which he was asked to report on were made from land positions in Singapore and Kuching. To the best of his recollection, the satellite pictures over the area where the vessels were on the material date showed clouds not related to storms. The weather satellites, however, do not give data relating to wind or rain on the surface. But Mr. Foong said, that from the pictures of the type of clouds covering the surface of the earth one can deduce the presence of storms. From the information he had gathered, Mr. Foong made an assessment that the vessels could not have gone through adverse conditions of the kind reported by the master of the tug "Donna." However, Mr. Foong made an important concession that if the entries in the log book were correct, then the vessels did go through a tropical storm.

The other expert witness who gave evidence for the plaintiffs on weather conditions was Capt. Clark. He made two points. One, he did not think it possible, even if there was a squall in the area where the vessels were, for the sea to increase in height from 3 to 5 feet to 12 to 20 feet in the short space of one hour as shown in the log book. The other point he made was that a squall was normally of short duration and of high intensity lasting for probably half an hour, so that there could not have been a squall for 7 hours. That the vessels had gone through a squall was of course his reading of the entries in the log book which state, *inter alia*, rough sea, stormy wind and heavy swell. However, he too, like Mr. Foong, conceded that if the account in the log book was correct, then the vessels had encountered a tropical storm.

When I dismissed the plaintiffs' claim, I said in my oral judgment, that there was other evidence in the plaintiffs' case which more than neutralized the expert evidence of Mr. Foong and Capt. Clark. I referred to the evidence of Mr. Yong Yoke Tong, who carried out the survey of "Benoi VI" soon after the barge arrived in Singapore. To write his report, he inspected the log book, he read the Master's Note of Protest and he interviewed the Master. He went on board the "Benoi VI." He saw the barge generally indented. He found eight out of the twelve starboard stanchions missing; seven pieces of air pipes on starboard tanks were also missing and the openings plugged; only 46 (out of 994) pieces of logs remained on board with loose lashing attached on them; several lengths of cables and chains were lying on deck; and the Northwest crawler crane on the barge was generally damaged. It was based on all this information that Mr. Yong, an experienced engineering surveyor, concluded that the loss of the cargo was, as I put it, caused by perils of the sea when the vessels were proceeding to Singapore.

Here I want to say a few words on the comment of Capt. Clark that the conclusion of Mr. Yong was not correct. I disagreed with him. To begin with, Mr. Yong's survey report was countersigned by Capt. Callander, a master mariner, of the same standing as Capt. Clark. Indeed Capt. Clark said that Capt. Callander was competent to form his opinion from the information given to him by Mr. Yong. Next, Capt. Clark did not have the advantage of Mr. Yong. He did not interview the master of the tug, nor did he inspect the barge "Benoi VI." In any event, Capt. Clark did not take the stand that the matters relied upon by the surveyors were all fabrications.

Next, as I have earlier said, at the continued hearing, I heard the evidence of Shahidan bin

Ahmad, as part of the plaintiffs' case. In March 1973, he was the Master of the tug "Asiatic Daring." When "Donna" and "Benoi VI" were on their way to Singapore, the "Asiatic Daring" was towing an empty barge from Singapore to Pemangkat. Shahidan said he did not experience any storm during that journey.

In the witness box, Shahidan produced a sea chart of the geographical area between Singapore and Pemangkat. On it were drawn two routes, one, of his journey from Singapore to Pemangkat, and the other, from information he had obtained from the log book of the "Donna," the course the latter had taken from Pemangkat to Singapore. At this point Mr. Loh for the plaintiffs asked him where he had obtained the chart from. He said that the chart was from his vessel. A surprised Mr. Loh said: "I know for a fact it is not from his vessel." Shahidan would not say that Mr. Loh had given him the chart to plot the two courses. He said: "I cannot remember whether a blank chart was given by you." Later he was to say that he plotted the course of the "Donna" on the chart that morning from information given to him by Mr. Loh. This incident in the witness box did not speak well for Shahidan.

As for the routes plotted on the chart, it was noted that on March 20, at about 6.00 a.m., the "Asiatic Daring" was on a parallel course to that of the tug "Donna," and they were approximately 74 nautical miles apart. Thereafter the gap increased and at noon the next day, the two of them were 105 nautical miles apart. Here I pause to observe that Shahidan produced the log book of "Asiatic Daring." It was not as comprehensive as that of the "Donna." Shahidan was also unable to explain some of the entries in them. Notwithstanding these shortcomings, what was of interest in the log book were the entries "raft sea" and "rolling raf." It seemed to me that "raft" and "raf" meant "rough." So it was that "Asiatic Daring" too did go through rough seas on its journey to Pemangkat though it was sailing quite far away from the "Donna."

Coming back to the oral evidence of Shahidan, he accepted that the path taken by "Donna" was consistent with the Master seeking shelter from the rough seas. And, as a master of local trade vessel, he said that it does happen that heavy seas last up to 5 or 6 hours, an experience different from that of Capt. Clark. Having heard Shahidan, I was of the view that he had not contributed anything in favour of the plaintiffs' case; in fact it was otherwise.

Be that as it may, I then heard the evidence for the defendants. The master of the "Donna" died on September 16, 1983. He had been available and was outside the Court at the last hearing. His death having been proved, there was admitted in evidence his Protest Note, Voyage Report and certain radio cables he had despatched to his employers during the voyage to Singapore.

The best evidence were the cables. The plaintiffs knew of them. They speak for themselves:

(1) Left Pemangkat .....
Now Proceeding Berhala Strait due Rough Sea Speed 5 Knots Cargo Ramin Logs . . . Tow Ok

(2) 0800 Dr Position 0005N 10601E Rough Sea Stop Benoi6 Listing Dangerously On Starboard Logs Overboard Approximately 30 Percent Left

Onboard Unable To Do Anything Proceeding Tanjong Jang 70 Miles For Shelter And Check Barge.

(3) 0700 Pulaukukau 5 Miles of Tanjongjang Now Position 0019S 10457E To Singapore 133 Miles Barge Aground For Pumping Due Listing Badly On Starboard All Tanks Full Stop Balance Logs Onboard 46 Pieces Now Commence Pumping.

(4) Benoi6 Safe Pumping Slow Require 2 Diesel Water Pump Complete For Donna Fuel HSD 5 Freshwater 5 Tons.

(5) Left Teloklingga 26063 Eta Eastern Anchorage 27090 Towing Benoi6.

The tug and barge arrived in Singapore at 9.10 a.m. on March 27. The Protest Note of the Master was made on March 29 before a notary public. The relevant portion of the Note was as follows:

"The vessel under my command left Pemangkat on March 18, 1973 1415 hours heading for Singapore, the barge being laden with 994 pieces of Indonesian Ramin round logs weighing 721,791 kilograms and measuring 801.99 securely lashed to the barge by means of wire ropes and chains with turnbuckles and shackles. Due to very rough sea and strong North East winds causing the tugboat and barge to roll and pitch heavily, I altered course at 1830 hours of the same day aiming for Berhala Strait in order to obtain sheltered passage part of the way.

The condition of weather and sea remained the same through March 19, 1973.

At approximately 0600 hours of the 20th winds and swell increased prompting me to slow down the engine. At 0700 hours I noted the barge listing to starboard and the logs having shifted to the same (starboard) side. At 0835 hours I saw logs falling off the starboard side and the barge listing even more heavily. I further reduced speed and made for Tanjong Djang, approximately 70 miles from my position then, in order to find shelter.

On the 21st at 0700 hours entered the bay of Lingga (Teluk Lingga) between Tanjong Djang and Tanjong Kokau. At 0800 hours grounded the barge and brought the tugboat

alongside it. My inspection of the barge revealed the following :

CONDITION OF THE BARGE

1. The Starboard Navigation Light and Stern Light washed away with their stanchion pole.
2. The Starboard stanchions 8 pieces broken and having 1 piece bent and 3 erect.
3. The Starboard air pipes 7 pieces broken.
4. Port side air pipe slightly bent.
5. All lashing wires and chains broken.
6. All Starboard tanks filled with water.

I immediately put the crew of the tugboat at work, pumping out the water from the tanks using the tugboats pump, handpumps and buckets which continued until the tanks were dry. I wish to note here that on March 22, 1973 at 1100 hours the fuel of the tugboat's pump ran out and that I then cabled my principals at Singapore for assistance. This assistance came on March 25, 1973 at 1315 hours in the form of the tugboat "Mantin" with 2 diesel water pumps.

On March 26, 1973 at 0200 hours all tanks were pumped empty and the tank holes closed and tightened. At 0630 hours the barges anchor was heaved up and proceeded to Singapore where we arrived on the 27th . . . . . "

Now, at the close of the plaintiffs' case, the expert witnesses for the plaintiffs did not dispute the contents of these documents. They were called, so it was submitted for the plaintiffs, to cast doubts on these documents. But that, as I said then, was not good enough for the burden was on the plaintiffs to prove their case on a balance of probability. Having heard the defence, on a consideration of all of the evidence before me, I was satisfied beyond doubt that the two vessels went through rough seas on their journey from Pemangkat to Singapore, and that the logs were lost as pleaded by the defendants in their defence, that is to say, perils of the sea in the course of the voyage.

There was a subsidiary issue as to whether "Benoi VI," was unseaworthy at the commencement of the voyage. On this issue, the evidence was that "Benoi VI" was a new barge constructed in 1971. As regards stowage, there was evidence that the master of the "Donna" took effective steps in rechecking the lashings of the logs on the barge. The log book and the voyage report showed that on March 17, 1973, at about 8 a.m. the crew of "Donna" re-checked the lashings and tightened any loose logs on board "Benoi VI." That took an hour and a half, for it was at 9.30 a.m. that they completed checking and found all in good order. So the cargo was properly stowed on the barge. On these facts, I accepted the submission of Mr. Cheong for the defendants that the barge was not unseaworthy at the commencement of the voyage.

For all these reasons, the plaintiffs' claim was dismissed with costs.

[The plaintiffs appealed to the Court of Appeal.]

COURT OF APPEAL.

Loh Boon Huat for the appellants.

Cheong Yuen Hee (*Roy Chua* with him) for the respondents.

Cur. Adv. Vult.

Thean J.: (delivering the Judgment of the Court). This appeal arises from a claim by the appellants against the respondents for damages for the loss of 948 pieces of Indonesian ramin round logs carried on board the respondents' barge from Indonesia to Singapore. The appellants' claim was dismissed with costs by the High Court.

Under a fixture note made between the appellants and the second respondents, there was shipped on "Benoi VI," a dumb barge, belonging to the first respondents, 994 pieces of Indonesian ramin round logs for carriage from Indonesia to Singapore. "Benoi VI" was towed by the tug boat "Donna." When the vessels arrived in Singapore almost all of the logs were missing. The insurers were informed. An investigation was carried out by Singapore Adjusters and Surveyors Co. (Pte.) Ltd, marine surveyors and consultants. The surveyors concluded that "Based on our inspection and the evidence obtained, we are of the opinion that the loss of the cargo is attributable to the heavy weather prevailing during the period the vessel was proceeding to Singapore."

Acting on that report, the insurers made payment for the loss of the logs in the sum of $103,304.65. The insurers then commenced this subrogated action. The main issue at the trial was whether the loss of the logs was caused by perils of the sea in the course of the voyage. After consideration of all the evidence the learned Judge said: "I was satisfied beyond doubt that the two vessels went through rough seas on their journey from Pemangkat to Singapore, and that the logs were lost as pleaded by the defendants in their defence,

that is to say, perils of the sea in the course of the voyage." The other issue before the trial Court was whether "Benoi VI" was unseaworthy at the commencement of the voyage. The learned Judge found that the barge was not unseaworthy at the commencement of the voyage.

The main issue raised here and below is whether the cargo was lost due to the perils of the sea.

On this issue it is common ground that the learned Judge misdirected himself by placing the burden of proof on the appellants. The authorities are clear that the burden of proving, on the balance of probabilities, that perils of the sea was the real cause of the loss was, and remained throughout, on the carrier.

The Master of the "Donna" died on September 16, 1983, and he was not available to give evidence at the hearing. His death having been proved, there was admitted in evidence his Protest Note, Voyage Report and certain radio cables he had despatched to his employers during the voyage to Singapore.

The peril of the sea relied upon by the second respondents was particularised in their Defence as follows:

"On 18th March, 1973, the day when the barge 'BENOI VI' towed by tug 'DONNA' left Port Pemangkat for Singapore, a rough sea and strong wind developed causing the master of the said tug to alter course at 6.30 p.m. on the same day in order to obtain shelter therefrom. The condition of the said sea and weather remained the same throughout the next day. On 20th March, 1973 at 6.00 a.m., the strong winds and rough sea increased. Consequently at 7.00 a.m. of the same day the said barge began to list to its starboard sides and at 8.35 a.m., logs began to fall off the starboard side off the said barge."

Was the learned Judge justified on the evidence in finding that there was a peril of the sea? This would depend on the meaning to be attached to those words.

In the House of Lords in *Wilson, Sons & Co.* v. *Owners of Cargo per the Xantho*[1] Lord Herschell said:

"I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea."

In the House of Lords in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.*[2] Lord Macnaghten said:

"Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances."

In the Privy Council in *Grant, Smith and Co. and McDonnell, Ltd.* v. *Seattle Construction and Dry Dock Co.*[3] Lord Buckmaster in delivering the judgment of the Board said:

"It is not desirable to attempt to define too exactly a "marine risk" or a "peril of the sea," but it can at least be said that it is some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have occurred."

In general, the term "perils of the sea" refers only to fortuitous accidents or casualties of the seas and does not include the ordinary action of the winds and waves. Whether in any particular case there is a peril or not is a question of fact.

The Master's log book entries show that the "Donna" encountered wind speeds of Force 5 to Force 8 on March 20, 1981. This is supported by the radio cables which the Master despatched to his employers during the voyage to Singapore, and by his Protest Note which was made after the tug and barge arrived in Singapore before a notary public.

A witness for the appellants on this issue was Mr. Foong Sze Fook, an Assistant Director of Meteorological Department. He gave a weather report of the sea area where it was said the vessels had encountered bad weather.

He was shown the Master's log book. He commented:

"Force 8 is equivalent to a wind-speed of about 38 knots. Force 5 is equivalent to wind-speed of about 18 knots. The persistence of Force 8 winds for 6 hours has never been reported in the area in question throughout the length of my service in the Meteorological Office. Force 8 winds would normally be associated to a tropical storm in tropical latitudes. A tropical storm should be detectable on the weather charts and weather satellite pictures available for assessment of this particular report. To the best of my knowledge, no tropical storm occurred over this area on 20.3.73."

He said that from the pictures of the type of clouds covering the surface of the earth one can deduce the presence of storms. From the information he had gathered, he made an assessment that the vessels could not have gone through adverse conditions of the kind reported by the Master of the "Donna."

The effect of Mr. Foong Sze Fook's evidence was that he made a forecast on wind conditions and on that he relied on weather radar instruments positioned at various positions in Singapore and these instruments cover a radius of 250 nautical miles.

Another witness for the appellants Shahidan bin Ahmad, the Master of the tug "Asiatic Daring" in March 1973, said that on March 19, 1973, the "Asiatic Daring" left Singapore at 8 a.m. for Pemangkat (that was the time when "Donna" and "Benoi VI" were on their way to Singapore). The "Asiatic Daring" was towing an empty barge. He said that he did not experience any storm during that journey; that on March 20, 1973, the wind force he experienced was between Force 1 and 2. In the witness box Shahidan produced a sea chart on which he said he had plotted the course of the "Asiatic Daring" and the course of the "Donna." He had plotted the course of the "Donna" on that chart that morning that he gave evidence from information given to him by Mr. Loh, counsel for the appellants.

As for the two courses plotted by Shahidan on the sea chart, the learned Judge noted that on March 20, at about 6 a.m. "Asiatic Daring" was on a parallel course to that of the tug "Donna," and they were approximately 74 nautical miles apart. Thereafter the gap increased and at noon that day, the witness said the two vessels were 105 nautical miles apart.

He said that from his experience, with the difference in distance, the "Asiatic Daring" and the "Donna" could experience different weather conditions; that the difference in wind force would be different, for instance, if at that time he experienced Force 2 to 3 the "Donna" could experience between Force 4 to 5; that at that time he experienced Force 1 to 2, the "Donna" would have experienced between Force 2 and 4. In cross-examination he said that in his experience it does sometimes happen that the wind could pick up considerable speed in the open area over a distance of 50 to 100 nautical miles. He also said he did not use an instrument to record the wind force; he estimated with his eyes by looking at the height of the waves.

The learned Judge observed that the log book of "Asiatic Daring" was not as comprehensive as that of the "Donna," and that Shahidan was also unable to explain some of the entries in them. The learned Judge said that what was of interest in the log book were the entries "raft sea" and "rolling raf." We are of the view that the learned trial Judge was not wrong in interpreting that "raft" and "raf" meant "rough." The learned Judge came to the conclusion that "Asiatic Daring" too did go through rough seas on its journey to Pemangkat though it was sailing quite far away from the "Donna." We are unable to say that that finding is wrong.

Shahidan accepted that the path taken by "Donna" was consistent with the Master seeking shelter from the rough seas. He said that seeing the entries in "Donna's" log book of the weather conditions, if he was the master of "Donna," he would have taken shelter at Linga Island. He said that as a master of local trade vessel, it does happen that heavy seas last up to 5 or 6 hours.

The learned Judge, having heard Shahidan, was of the view that he had not contributed anything in favour of the appellants' case, in fact it was otherwise. We can see no reason to disagree with the learned Judge's assessment of Shahidan's evidence.

Mr. Yong Yoke Tong, an Engineering Surveyor with Singapore Adjusters & Surveyors Co. (Pte) Ltd. carried out a survey of the "Benoi VI" soon after the barge arrived in Singapore for the purpose of establishing the causes leading to the loss of the deck cargo and put up a report. To write his report, he inspected the log book, read the Master's Protest Note and he interviewed the Master. He found eight out of the twelve starboard stanchions

missing; seven pieces of air pipes on starboard tanks were missing and the openings plugged; only 46 (out of 994) pieces of logs remained on board with loose lashing attached on them; several lengths of cables and chains were lying on deck; the Northwest crawler crane on the barge was generally damaged; the barge was generally indented and the barge was floating at 11 feet aft and 8½ feet forward. Based on all these information he concluded: "We are of the opinion that the loss of the cargo was attributable to the heavy weather prevailing during the period the vessel was proceeding to Singapore."

Captain William Peter Clark, another witness called by the appellants, commented that the conclusion of Mr. Yong Yoke Tong was not correct. Captain Clark's evidence was to the effect that the Master's log book and Protest Note in respect of the "Donna" could not be an accurate record of the conditions actually experienced by the "Donna." In our view on the evidence the learned Judge was right in disagreeing with Captain Clark. Captain Clark agreed with Mr. Foong Sze Fook regarding the tropical storms if the log book account of the "Donna" is correct.

It appears to us (as it did to the learned Judge) that the best evidence which supported the entries in the log book of the "Donna" were the cables sent by the Master to his employers during the voyage. There is no reason to believe that the entries in the log book were fabricated. The probabilities are that the two vessels went through a tropical storm, which was fortuitous, on their journey from Pemangkat to Singapore. In our judgment the loss was occasioned by the perils of the sea.

In the result the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Godwin & Co.; Y.A. Cheong.*

TAN KOON SWAN v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Sinnathuray & Chua JJ.) October 16, 1986]

[Singapore – Criminal Appeal No. 16 of 1986]

Criminal Law and Procedure – Criminal breach of trust – Sentencing – Principles applied.

Penal Code, ss. 109 & 406 – Criminal breach of trust – Sentence.

In the present case the accused, Tan Koon Swan, was charged and convicted for the offence of abetting a director of a public listed company, Pan Electric Industries Ltd. (Pan El), in the commission of the offence of criminal breach of trust involving $144,852.88, which was the interest due to a stockbroking company in connection with the acquisition of shares by a Pan El subsidiary.

The accused was sentenced to 2 years' imprisonment and a fine of $500,000 ([1987] 1 M.L.J. 18) The accused appealed against the sentence.

Held, dismissing the appeal: (1) the Court as an appellate court when considering an appeal as to the sentence imposed by a trial court should act upon the following principles: The Court can and will interfere if it is satisfied that (a) the sentencing Judge has made the wrong decision as to the proper factual basis for sentence; (b) there has been an error on the part of the trial Judge in appreciating the material placed before him; (c) the sentence was wrong in principle; (d) that the sentence imposed was manifestly excessive;

(2) in the present case, having regard to all the circumstances of the case, the sentence was not excessive.

COURT OF CRIMINAL APPEAL.

M. Karthigesu for the appellant.

Glenn Knight (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Wee Chong Jin C.J.: (delivering the Judgment of the Court): This is an appeal against the sentence imposed by Mr. Justice Lai on a plea of guilty by the appellant to a charge of abetting a director of a public listed company, Pan Electric Industries Ltd. ('Pan-El'), who was also a director of other companies which are subsidiaries of Pan El in the commission of the offence of criminal breach of trust. The charge related to breach of trust in respect of $144,852.88 which was the interest due to a stockbroking company in connection with the acquisition of 3 million Grand United Holdings Ltd ('GUH') shares for $4,778,895 by a Pan El subsidiary Orchard Hotel (S) Pte. Ltd.

The sentence imposed on the appellant was one of 2 years' imprisonment and a fine of